

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT.

UNITED STATES OF AMERICA,

Appellant,

VS.

JENNIE PETERSON, (Formerly Jennie
Benedict), WILLIAM H. ALBRIGHT
and VILLA C. ALBRIGHT,

Appellees.

BRIEF OF APPELLANT.

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STATEMENT OF CASE.

This is an appeal from the decree entered by the District Court of the United States for the District of Montana on the 14th day of January, 1914, in favor of the appellees and against the appellant and dismissing appellant's bill of complaint (Tr. p. 48.)

The suit in which said decree was entered was brought by appellant for the purpose of having cancelled and set aside on the ground of fraud a patent

for lands theretofore issued to Jennie Peterson, then named and known as Jennie Benedict, one of the defendants therein, the bill of complaint having been filed on December 9, 1911. The bill of complaint (Tr. pp. 2 to 28) alleges in substance that the appellant was on or prior to the 19th day of July, 1901, the owner in fee of certain mineral lands, situated in the state and district of Montana; that some time prior to the 11th day of July, 1901, the defendant, Jennie Peterson, then named and known as Jennie Benedict, and William A. Albright entered into an unlawful agreement, whereby said Jennie Peterson was to enter said lands and acquire title thereto as a homestead under the provisions of section 2289 Revised Statutes of the United States, for the use and benefit of the appellee, William H. Albright, the said appellee, William H. Albright to pay all expenses in connection with such entry and the acquiring of the title to said lands by the defendant, Jennie Peterson, and the land office fees in connection therewith, the purchase price for said lands and the expenses of making the necessary improvements thereon, and the defendant, Jennie Peterson, to convey said lands to appellee, William H. Albright, after title was acquired thereto; that pursuant to said unlawful agreement the defendant, Jennie Peterson, then named and known as Jennie Benedict, entered said land as a homestead by making and filing in the United States land office at Helena, Montana, her application to enter said lands, together with a homestead affidavit and

a non-mineral affidavit, and thereafter amended said homestead entry and made final proof thereon, and after paying the purchase price therefor, with money belonging to William H. Albright, received from the officers of the land office a final receipt and final certificate, and thereafter a patent was issued to her by the United States to said lands; that thereafter, at the request of the appellee, William H. Albright, she conveyed said lands by deed to the appellee, Villa C. Albright, the wife of the appellee, William H. Albright; that said lands were mineral in character and said fact was known to the defendant, Jennie Peterson, and the appellee, William H. Albright, at the time said unlawful agreement was entered into; that the filing fees paid on said entry, the personal expenses of the defendant, Jennie Peterson, and her final proof witnesses in connection with said entry and final proof, the costs of making improvements on said lands, and the purchase price paid therefor were all paid and furnished directly by or through agents of the appellee, William H. Albright, in pursuance of said unlawful agreement; that the statements contained in said non-mineral affidavit and said homestead affidavit and said final proof depositions of the defendant, Jennie Peterson, and her two final proof witnesses, were false and fraudulent, and known to be false and fraudulent by the said defendant, Jennie Peterson, and the appellee, William H. Albright, at the time the same were made and filed, and that the same were made and filed for

the purpose of deceiving the officers of the United States and fraudulently obtaining title to said lands for the benefit of the appellee, William H. Albright, and that the land office officers, believing said statements to be true, were mislead and deceived thereby and allowed said entry to be made, accepted said final proof, issued said final receipt on said final proof, and that patent from the United States therefor followed; that when said lands were conveyed by the defendant, Jennie Peterson to the appellee, Villa C. Albright, the purchase price therefor was paid by the appellee, William H. Albright, out of his own money; that the title then taken and now held by the appellee, Villa C. Albright, was taken and is now held by her as trustee for the appellee, William H. Albright, and that at the time of such purchase from the defendant, Jennie Peterson, the appellee, Villa C. Albright, knew all of the facts in connection with the acquiring of the title to said lands by said defendant, Jennie Peterson, and that the same was acquired by fraud.

The appellees in their joint and several answer filed February 17, 1912 (Tr. pp. 31 to 42) in substance admit the ownership by the United States of said lands as alleged in the bill of complaint; deny that said lands were mineral and allege that they were at all times non-mineral; deny that the defendant, Jennie Peterson, and the appellee, William H. Albright, either for himself or on behalf of the defendant, Villa C. Albright, entered into any agreement or contract of any kind in regard to the

entry or acquiring title to said lands by the defendant, Jennie Peterson; deny that either said entry or said final proof was made by the defendant, Jennie Peterson, or that the title was acquired to said lands by her, or that the same was conveyed to the appellee, Villa C. Albright, in pursuance of any agreement of any kind between the defendant, Jennie Peterson, and the appellee, William H. Albright; deny that the filing fees on said entry, or the personal expenses of the defendant, Jennie Peterson, or of her final proof witnesses, in connection with said entry and final proof, or the purchase price paid the United States for said lands, or the costs in making improvements on said lands, were paid, either directly or indirectly, by the appellee, William H. Albright, and allege that the same, and all thereof, were paid by the defendant, Jennie Peterson, out of her own money; deny that any of the statements contained in any of the affidavits or depositions made and filed in connection with said entry and final proof were false or fraudulent, and allege that if any of said statements were false and fraudulent neither of the appellees, William H. Albright or Villa C. Albright, ever at any time had any knowledge thereof; allege that the defendant, Villa C. Albright, purchased said lands from the defendant, Jennie Peterson, in good faith, paying the sum of \$800.00 therefor.

To the joint answer of the appellees the appellant on the 17th day of February, 1912, filed its reply (Tr. p. 43). On the 22nd day of March, 1912,

an order pro confesso as to the defendant, Jennie Peterson, was duly filed and entered (Tr. pp.46 and 47). On April 11, 1912, an order was duly made appointing a special examiner to take the testimony in said cause and report the same to the court (Tr. p. 51), and thereafter said special examiner took such testimony and reported the same to the court (Tr. pp. 54 to 119). Said testimony having been duly considered by the court, said court on the 18th day of August, 1913, duly rendered and filed its decision and opinion in said cause (Tr. pp. 49 and 50), and on the 14th day of June, 1914, a decree was duly made and filed in said cause in favor of the appellees and against the appellant and dismissing said bill of complaint (Tr. p. 48).

ASSIGNMENT OF ERRORS.

With the petition for appeal the following assignment of errors were filed (Tr. pp. 123 and 124).

1. The court erred in finding that the evidence taken in said cause at the hearing thereof was insufficient to sustain the allegations of the bill of complaint therein.

2. The court erred in ordering a decree herein in favor of the defendants and against the complaint and dismissing the bill of complaint.

3. The court erred in entering a decree herein in favor of the defendants and against the complainant and dismissing complainant's bill of complaint.

ARGUMENT.

As the appellant contends that the evidence taken by the special examiner was sufficient to sustain the allegations of its bill of complaint, we shall only take up and consider the first specification of errors assigned that “the court erred in finding that the evidence taken in said cause at the hearing thereof was insufficient to sustain the allegations of the bill of complaint therein,” it naturally following that if the court did so err then, error was also committed by the court in ordering and entering the decree dismissing appellant’s bill of complaint as specified in the second and third assignment of errors.

Before the special examiner evidence was introduced on behalf of the appellant for the purpose of proving the allegations of its bill of complaint to the effect,

First: that said land was mineral in character and that said fact was known to the defendant, Jennie Peterson, and the appellee, William H. Albright, at the time the entry was made by the defendant, Jennie Peterson;

Second: That the entry of said land, the final proof thereof and the title acquired thereto by the defendant, Jennie Peterson, was for the purpose of perpetrating a fraud upon the appellant and fraudulently acquiring title to said land for the benefit of the appellee, William H. Albright, in pursuance of an unlawful agreement made between

the defendant, Jennie Peterson, and the appellee, William H. Albright;

Third: That the appellee, Villa C. Albright, knew of the fraud perpetrated upon the appellant by the defendant, Jennie Peterson, and the appellee, William H. Albright, in connection with the acquiring of the title to said lands by the defendant, Jennie Peterson, and was not an innocent purchaser thereof in good faith for a valuable consideration.

We shall take up and consider the evidence in the order in which the same is contained in the bill of complaint.

CHARACTER OF LAND.

The only evidence in regard to the mineral or non-mineral character of the land was that of Frank C. Whittaker, a witness for the appellant (Tr. pp. 85 to 87 and 90 and 91), the appellee, William H. Albright (Tr. p. 193), and O. C. Mortson, a witness for the appellees (Tr. pp. 117-118). We at this time admit that the evidence introduced on the part of the appellant was and is insufficient to sustain the allegations of the bill of complaint that the land was mineral in character, and admit that the land was at the time of such entry subject to entry as a homestead under the provisions of section 2289 Revised Statutes of the United States.

THE CONTRACT OR AGREEMENT.

We most earnestly contend that the evidence introduced on behalf of the appellant, in connection with the admitted facts and circumstances,

proves conclusively that the defendant, Jennie Peterson, and the appellee, William H. Albright, prior to the entry of said lands by the defendant, Jennie Peterson, entered into an unlawful contract or agreement, by the terms of which the defendant, Jennie Peterson was to enter said lands and acquire title thereto as a homestead for the benefit of the appellee, William H. Albright, and that in pursuance of such unlawful contract or agreement the defendant, Jennie Peterson, entered and acquired title to said lands, and thereafter conveyed the same to the appellee, Villa C. Albright, for the benefit of the appellee, William H. Albright. The evidence introduced on behalf of the appellant was in substance as follows:

The defendant Jennie Peterson, testifying on behalf of the appellant, said that when she was about eighteen years of age and working for the appellees, Albright's, several parties were taking up homesteads for the appellee, William H. Albright, and she said in a general conversation that when she got old enough she would like to take up a ranch; that she would take up a homestead for Mr. Albright (Tr. p. 56); that she had worked for the Albrights for more than two and one-half years before taking up her homestead; not continuously, but a few months each spring; that just prior to filing on her homestead she had been living with her mother in Michigan (Tr. p. 56); that she had some correspondence with appellee, William H. Albright, and in one letter he wrote that he understood she

wanted to come west again, and that as she was old enough she could file on a homestead and that he had a piece of land in view and if she decided to come to let him know and that he would send a ticket; that she answered his letter and he sent a ticket to her at Crosswelle, Michigan; that she used the ticket, leaving Michigan on July 5, 1901; that when she arrived in Great Falls she went to the Great Falls Hotel and was met by Mr. Albright in that town. When she met him he told her the papers were ready in Prior's office, and she went there and filed on her homestead; that she had not been on the land and did not know where it was located; that she did not prepare the papers, or have anything to do with preparing them; that she did not pay Prior and did not know who did, and that she did not pay the filing fees and did not know who did (Tr. p. 57); that she and Mr. Albright discussed what she was to receive for the land when she proved up on it. When she filed on the land she was to commute it and prove up at the end of fourteen months, and was to receive \$640.00, the same as the rest received for their homestead rights, but if she kept it for five years he said he might do a little better by her because it would not cost so much to prove up on it. At that time she was in Great Falls, and made her entry, he told her she was to receive the same as the rest received that took up homesteads and that she understood that was \$640.00; he was to pay all expenses during the life of the entry (Tr. p. 58). After making the entry,

she worked for Mr. Albright some times and some times lived on her homestead. She never had anything to do with building the house (Tr. p. 58). She lived on the land the most of the summer of 1902; there was not a week that she was not there. She was there for two weeks at a time steady. She was working for Mr. Albright during the time (Tr. p. 58). When she lived upon the land he used to furnish her with provisions; that was part of the agreement made at the time she filed on the land; he was to pay all expenses (Tr. p. 58). During the time she lived on the land and during the life of the entry, she never paid out anything for expenses in the way of improvements (Tr. p. 59). Mr. Quick was one of her witnesses and she went over for him at Mr. Albright's request. She did not pay the expenses of her witnesses. Mr. Albright gave her money to pay Br. Benson, the other witness; that was in Great Falls (Tr. p. 59). She does not know where the final proofs were prepared, or who made them; she had nothing to do with them. She does not know at whose request they were prepared and had nothing to do with them (Tr. p. 60). She did not pay the filing fees, or the fees on final proof (Tr. p. 60). She made a commuted proof and Mr. Albright gave her the money; she did not furnish the money (Tr. p. 60). After her final proof receipt came, she transferred it to Mr. or Mrs. Albright; she did this in Great Falls in Prior's office (Tr. p. 60). She got \$600.00 for the land, \$500.00 in a note of Mr. Albright and \$100.00 in cash or by

check. The note was signed by W. H. Albright and he did not sign as agent for Villa C. Albright (Tr. p. 60). The note was paid the next May by Mr. Albright to Mr. Peterson (Tr. p. 61). She had been in Michigan about two years before returning to Montana in the summer of 1901; Mr. Albright wrote to her and told her if she wanted to take up a homestead for him she could come back and they would give her work and she could prove up on it. She was certain he said "If I still wanted to take up a homestead for him," and sure he used the words "for him" (Tr. p. 62). The letter was in Mr. Albright's handwriting (Tr. p. 63). Afterwards she received a letter saying he would send her a ticket to come to Montana on and later he sent her the ticket. He said she could work for Mrs. Albright, and she went to work right after Christmas and worked for them the greater part of that winter and the following spring and summer (Tr. p. 63). She told Mr. Albright she would turn the ranch over to him on the same terms he was giving the rest. She made a verbal agreement with Mr. Albright (Tr. p. 65). When she arrived from Michigan she went to the Great Falls Hotel; she met Mr. Albright on the street corner and talked with him there in Great Falls the day after she arrived. The first thing Mr. Albright said to her was that he had the homestead papers ready to file and she could file on a homestead at once (Tr. p. 65). She had been over the country before on horse back when she was younger, but did not know the country; it was not

familiar to her at all (Tr. p. 65). Mr. Albright told her at that time that she could come back to work later, and she went to work for him later on (Tr. p. 65). He told her at that time he had the papers all ready in Prior's office and he went there with her (Tr. p. 65). She met him in the morning and they went to the office in the afternoon (Tr. p. 65). He told her he would fix the price for her homestead all right and would give her the same as the rest; that was all that was said. She had not asked him what price he would pay, but understood it to be \$640.00. She wanted to take up the homestead because she thought it would be a nice way to make money. He did not give her to understand that when the homestead was proved up he would buy if she wanted to sell; it was his—she was to prove up for him (Transcript p. 66). The arrangement was not made with Mrs. Albright; it was made with Mr. Albright. She did not do any of the business—he did (Tr. p. *7). When she made her commuted proof in the land office, Mr. Albright was in town (Tr. p. 68). The gentleman before whom she made the final proof read the questions and she answered them just as Mr. Albright had told her to; he furnished her with a copy of the questions, or told her the questions they would ask, and she answered them just as she was told to (Tr. p. 68). She took up the land for her own benefit—for the benefit of her pocket book—for the money she could get, as she had already agreed to sell it to Mr. Albright (Tr. p. 68). She knew better than to tell the man

in the land office anything about the arrangement she had with Mr. Albright, as Mr. Albright had told her not to say anything about it (Tr. p. 68).

The evidence of the witness, Jennie Peterson, was corroborated by the evidence of appellant's witnesses Frank C. Whittaker, Mary Elizabeth Gustafson and Charles Gustafson. The witness Whittaker testified (Tr. pp. 75 to 93) in substance as follows: That he had known the appellees, William H. Albright and Villa C. Albright for sixteen or eighteen years; that he knew Mrs. Peterson and Charles Gustafson; that he was acquainted with the Jennie Peterson homestead and first knew it about 1901, when Mr. Albright talked to him about it and about getting her to take up some land. He had his first conversation about Jennie Peterson with Mr. and Mrs. Albright about April, 1901. The three of them talked it over and thought it would be a good thing to get her to come out and take up land for Mrs. Albright. Mr. Albright thought it would be a good thing and had no objections and they could send for her. They had these conversations in April, May and June. Jennie Peterson, then Jennie Benedict, was then in Michigan (Tr. p. 75). Mr. Albright suggested that he would send her a ticket to come out with and money for expenses, but first he would ask her if she would come. She said she would and he wanted to know if it was all right with me, and the witness said that he told him it was all right. The witness talked with Mrs. Albright and she said that it would be all right to

have her come and keep books and take up some land. Jennie Peterson, then Jennie Benedict, came out from Michigan, and Mr. Albright met her in Great Falls and had a description for her to file on. Before that Mr. Albright and Whittaker had staked and measured up the land with a compass; took a spirit level and paced off for about as far as they thought was 160 acres and put up three or four rocks in place so they would know about where it was (Tr. p. 76). He knows that Mrs. Peterson took up this homestead for Mrs. Albright because Mr. and Mrs. Albright and the witness talked about it. Mr. Albright said he had to have it taken up and signed over to Mrs. Albright so that it would clear him if there was any difficulty about the government getting after him. The witness knows that to be a fact and talked about it and they talked to one another. The three of them had conversations and talked about it; they said Mrs. Peterson, then Jennie Benedict, was to receive \$750.00 when she got her patent; there was a difference made her than some other people who had taken up land and sold to Mrs. Albright. Before she got patent she was to receive \$640.00, \$440.00 clear and he was to furnish the money to commute (Tr. p. 76). If she should stay on the land five years and did not commute, he would give her \$750.00 (Tr. pp. 76 and 77); Mr. Albright built the improvements. Mrs. Albright told the witness that they were paying for the improvements, the same as they paid for the rest of them (Tr. p. 77). After she made her

filing and until she submitted her final proof of the same, Jennie Peterson was working for Mr. and Mrs. Albright, keeping books at the quarry, and that the witness thinks she went back to Michigan once on a visit (Tr. p. 77). She did not pay any of the expenses of filing (Tr. p. 77). Five or six weeks before she made her final proof she went up there and took a few things. Prior to that time Mr. Albright would give her a horse from the quarry and some grub and she would go up and stay over night. The witness knows that when she went up there Mr. and Mrs. Albright told her to take provisions out of the kitchen and at one time they sent the witness up there so he could be a witness and he took some provisions out of Albright's kitchen (Tr. pp. 77 and 78). Mr. Albright made the agreement with Jennie Peterson before she made her filing by writing to her in Michigan. Mr. and Mrs. Albright and the witness talked about getting Jennie Peterson to take up land and Mr. Albright said he would write and ask Jennie Peterson, then Jennie Benedict, if she wanted to come out and keep books for him, and if so, he would send her a ticket and money for expenses and would meet her in Great Falls and show what land to file on. Mrs. Albright said that was all right. I know he showed me a letter or two that he got from Mrs. Peterson saying that she would take up the land for him. The witness did not know whether they had any other agreement or not. The letter said that she would take it up for Mr. and Mrs. Albright, both of

them (Tr. p. 89). He heard the conversations between Mr. and Mrs. Albright and himself about Jennie Peterson taking up the land (Tr. pp. 89 and 90).

The witness Mary Elizabeth Gustafson testified (Tr. pp. 92 to 94) in substance that she first came to the quarry at Albright in 1903, and became acquainted with the appellees (Tr. p. 93); that Jennie Peterson was then in Michigan visiting her parents and that Mr. Albright said that he was expecting her (Tr. p. 94). She returned in March (Tr. p. 94); Mr. Albright said to the witness just before Jennie Peterson returned in March that they had let that girl take up a homestead for them just to help out by working in the office and holding the land there, so it gave her a chance to make money in two places (Tr. p. 94).

The witness Charles Gustafson testified (Tr. p. 95 and 96) in substance, that he was acquainted with Mr. and Mrs. Albright and with Jennie Peterson, who was formerly Jennie Benedict; that when he first knew Jennie Peterson she was living at Albright keeping books for Mr. Albright at the quarry and attending the postoffice and store; that Jennie Peterson was working for Mr. Albright when she made her filing on the land; that witness had a conversation with Mr. Albright in which he told witness that Jennie Peterson was coming out there to take up land for him; this conversation was before she filed on the land; it was in April or May and she filed in July. Mr. and Mrs. Albright told the

witness that Jennie Peterson had taken up the land for Mr. Albright (Tr. p. 95). It was in 1901 that Mr. Albright said Jennie Peterson was coming up there to file on the land for him; she was coming from Michigan at that time; she came in the summer of 1901; Mr. Albright did not tell the witness what land she was going to file on (Tr. p. 96). Mrs. Peterson afterwards told witness in the fall of 1901 that she had taken up the land for Mr. Albright (Tr. p. 96).

The evidence of witnesses, Peterson, Whittaker, Mary Elizabeth Gustafson and Charles Gustafson was plain, definite and consistent, leaving nothing to supposition or surmise, and was strongly corroborated by the admitted facts and circumstances. First we have the evidence of witness Whittaker to the effect that in conversations between the witness Whittaker and the appellees Mr. and Mrs. Albright in April, May and June, 1901, they discussed the matter of having Jennie Peterson, then Jennie Benedict, come out to take up a homestead for the appellees; that it was agreed between them that if she was willing to do so, they would send her the ticket to come out from Michigan and money to pay her expenses, and that while she was holding down the homestead she might work for appellees keeping books, and that after some correspondence between appellees and Jennie Peterson, they sent her a ticket and she came out; that in these conversations it was understood between all of them that she was to take up the homestead for appellees, and

when she acquired title, was to convey it to them and was to receive \$640.00 if she commuted, and \$750.00 if she stayed on it five years; that before Jennie Peterson came out from Michigan, witness Whittaker and appellee William H. Albright went on the land on which she was to file and staked out and measured it off so that they would know where the corners were; that when Jennie Peterson came out from Michigan, appellee William H. Albright met her and she made her filing; and that from the time she made her filing and until she proved up, she worked for appellees two-thirds of the time.

Then we have the evidence of the witness Charles Gustafson to the effect that before Jennie Peterson filed on the land, the appellee William H. Albright told him in April or May before the filing was made that Jennie Peterson was coming out there to take up land for him.

Then we have the evidence of the defendant, Jennie Peterson, that she knew the conditions existing in that section of the country; that she had worked for appellees for two and one-half years before she made her filing; that while working for appellees and before going to Michigan, she had often expressed an intention of taking up a homestead for appellees when she was old enough; that while she was in Michigan she had some correspondence with the appellee William H. Albright with reference to her returning to Montana and taking up a homestead for him, and that he sent her a ticket and she came out; that he met her in Great

Falls and she made her filing; that it was agreed between them that she was to get \$640.00 if she commuted her entry and that he would do better by her if she stayed on it for five years; that he was to pay all of the expenses during the life of the entry; that he had selected the land and had the description she was to file on and that she had never seen it; that after she had made the entry she went to work for appellees after Christmas and worked for them the balance of that winter and the following spring and summer; that she did not pay any of the expenses of entry or final proof, or of making the improvements; that all of these expenses, including the purchase price of the land, was paid by Mr. Albright, and that she made the entry for his benefit and was to convey it to him after she had obtained title.

Then we have the evidence of the witness Mary Elizabeth Gustafson to the effect that at one time when Jennie Peterson was on a visit to Michigan and just before her return to Montana, the appellee, William H. Albright, told the witness that Jennie Peterson had been in Michigan and he was expecting her back, and that she had taken up a homestead for the appellees while she was working for them.

Then we have the following admitted facts and circumstances that Jennie Peterson, then Jennie Benedict, had worked for the appellees at times covering a period of more than two and one-half years before making the entry; that she was in Michigan

and afterwards returned to Montana and made her entry; that between the making of her entry and the date of making her final proof, she worked for the appellees at various times; that she made her final proof on August 5, 1905, and the land was conveyed to the appellee, Villa C. Albright, on August 28 of the same year; that she never had any dealings whatever in regard to the purchase of the land with Villa C. Albright, but that all of the dealings with reference to the land were had with the appellee, William H. Albright; that the purchase price of the land was paid to her by the appellee, William H. Albright, \$500.00 thereof being a note signed W. H. Albright, and the remainder being partly in cash and partly by a check signed by the appellee, William H. Albright.

From an examination of the opinion of the lower court (Tr. pp. 49-50), we are led to the conclusion that the court based its decision wholly and entirely upon the evidence of the defendant Jennie Peterson and the appellee William H. Albright and failed to give any consideration whatever either to the evidence of the corroborating witnesses, Whittaker and the two Gustavsons, or to the admitted facts and circumstances which corroborated the evidence of Peterson.

Taking the evidence of the witness Peterson, the corroborating evidence of the witnesses Whittaker and the two Gustavsons and the admitted facts and circumstances and considering them together as a whole could it have been possible to have made

out a stronger case in favor of the appellant? When an unlawful contract or agreement, of the character alleged in the bill of complaint, is entered into it is not reduced to writing or made openly and publicly, secrecy being essential to the successful carrying out and performance of its terms and therefore, the only manner in which the existence of such a contract or agreement can be proven is by the evidence of one or more of the parties thereto corroborated by the evidence of other witnesses as to facts and circumstances surrounding the entire transaction.

In this case we must believe that the evidence given by the witnesses who testified on behalf of the appellant and the admitted facts and circumstances were true and that an unlawful contract or agreement was entered into between the defendant Peterson and the appellee William H. Albright and that the terms of such contract or agreement were fully carried out and performed by the parties thereto, or else we must believe that these witnesses, conspiring together, concocted an elaborate scheme of false accusation and carried it out with deliberate, preconcerted and harmonious perjury. We can take no middle ground and believe that the witnesses for the appellant were simply mistaken in their evidence because this is not a case where witnesses for opposing parties may give conflicting evidence based on an honest difference of opinion or understanding of facts, but we are compelled to believe either that the evidence of the witnesses for the appellant was true or that each and all of

them intentionally and premeditatedly committed perjury.

It is true that the appellees offered evidence in contradiction of that given by the witnesses for the appellant. The appellee William H. Albright testified in behalf of the appellees (Tr. pp. 96-117): His evidence consisted principally of denials and attempts to corroborate these denials by entries in a time book kept by him while running his quarry, together with statements concerning the hostility of every witness testifying for the appellant. He attempts to negative every thing testified to by the witnesses for appellant and which were contrary to his interests, in fact he "Doth protest too much." Many of the facts and circumstances testified to by the witnesses for the appellant might easily and readily and reasonably have been explained by him but he makes no attempt to give any such explanation, meeting them all by positive denials. He brought in his time book to refresh his recollection, (Tr. pp. 102-103), in regard to the times and dates the defendant Jennie Peterson, and other persons, worked for him at his quarry, and the amounts they drew, and he testified that certain amounts, shown by the time book, were not drawn in cash but were for groceries, supplies, etc. (Tr. p. 103). At the same time he testified that the time book showed nothing but the time and dates they worked and the amounts they were paid, (Tr. p. 107), so that when he testified that certain amounts, shown by the time book to have been paid to Jennie Peterson,

were not paid in cash but were taken out in groceries, supplies, etc., he was testifying from memory alone in regard to all of these numerous small amounts and transactions which had taken place eight or ten years previously. He testified (Tr. pp. 97-98), that some times persons in his employ might come to him in the middle of the month for money and he would give it to them and the balance would be drawn at the end of the month so that there would be two entries for payments received during that month, the two items amounting to the total paid during that month. He further testified that groceries, supplies and every thing received out of the store by any person working for him were all charged in a day book and that the day book was lost (Tr. p. 111). If the time book only showed the time and amounts earned and paid, and the day book was lost, how was it possible for him to testify that eight or ten years before, for instance that in the month of May, 1902, one amount shown by the time book to have been received by Jennie Peterson was for stuff out of the store and another amount received by her during the same month was cash, or that in July, 1904, one amount represented trade and another amount cash (Tr. p. 103)? We desire to call attention to the opinion of the lower court (Tr. p. 50), in connection with this evidence. The court in its opinion finds that the books of the appellee William H. Albright were inconsistent with the evidence of the witness Jennie Peterson that the appellee William H. Albright paid all her

expenses in connection with the land. The Court seems to have understood from the evidence of the appellee William H. Albright that the time book showed that certain amounts were paid to the defendant Peterson in cash and that certain other amounts were paid in groceries, supplies, etc., entirely overlooking the evidence of the appellee William H. Albright to the effect that the time book only showed the actual amounts drawn by the witness Peterson, and did not itself show how the amounts were paid whether in cash or in supplies, etc., and that the appellee William H. Albright was testifying from memory alone when he testified that certain amounts were paid in cash and other amounts in supplies, etc.

The memory of the appellee William H. Albright was exceedingly good, it was clear, definite and distinct in regard to every thing connected with the Jennie Peterson entry, so good in fact, that he could remember every detail in regard to her taking up her homestead (Tr. pp. 100-104), and even how much cash she drew and how much was charged against her for groceries, supplies, etc., although the day book in which such charges were made was lost (Tr. p. 111), and the time book only showed the time she worked and the amounts she drew (Tr. pp. 103 and 107). Is it not somewhat peculiar that he could remember so distinctly every thing connected with the Jennie Peterson entry, even down to the smallest detail, when he could not remember when Gustafson took up his homestead because it was so

long ago, (Tr. p. 97), although it was after Jennie Peterson took up her homestead, or whether or not Jennie Peterson had been in Michigan just before taking up her homestead—it was so long ago (Tr. p. 105)? Is it not also somewhat peculiar that he was able to produce his time book while the day book kept at the same time was lost (Tr. p. 111), and the slips or memorandum which he kept during that time showing the amount of money he owed his wife was also lost (Tr. p. 111)? The lower court in its opinion (Tr. p. 50), seems to lay considerable stress on the fact that the letters and ticket, which the witness Peterson testified to, were lost, failing to take into consideration the fact that of all of the books and memorandum kept by the appellee William H. Albright, all were lost and could not be produced save and except the time book alone.

The appellee William H. Albright, in his evidence, tried to make it appear that every single witness testifying for the appellant was unfriendly to him and testified falsely for the sole purpose of trying to get even with him for some imaginary or fancied wrong. It is possible, of course, that some of the witnesses testifying for the appellant may not have been on the very best terms with the appellee William H. Albright, but, to believe his evidence, each and all of them were not only extremely hostile towards him but were even willing and anxious to perjure themselves if they might harm him. We submit that this evidence of the appellee William H. Albright shows so plainly on its face the purpose

for which it was given that it was and is entitled to no consideration whatever. In this evidence he attacks the witness Whittaker, who testified for the appellant, and would have it believed that Whittaker is somewhat of a notorious character, indolent and worthless and that he never had any use for him and never trusted him (Tr. pp. 102, 104, 110 and 111), yet the evidence of the witness Whittaker (Tr. p. 75), of the appellee William H. Albright (Tr. pp. 104 and 112), and of the appellee Villa C. Albright (Tr. p. 113), shows that the witness Whittaker and the appellee William H. Albright were associated together in business for several years and that very frequently during that time the witness Whittaker slept and took his meals at the Albright home (Tr. pp. 81 and 113), and the appellee Villa C. Albright testified that they were all on very good terms and that when Whittaker would come down with specimens he would stay with them and that he never forced himself upon them (Tr. p. 115). Evidently the appellee William H. Albright felt, that owing to the fact that Whittaker had given very damaging evidence against him, it was necessary to discredit his evidence in some way and that the only way open was to try and show a feeling of hostility on the part of the witness Whittaker and thus provide a motive for the giving of this evidence by Whittaker.

The appellee William H. Albright also testified in regard to the business transactions and relations between himself and his wife, the appellee Villa C.

Albright (Tr. pp. 102, 104, 108 and 116-117). Many of his statements are so ridiculous and absurd it is impossible to believe them to be true and others are partly discredited by the evidence of his wife, the appellee Villa C. Albright (Tr. pp. 115-116). We submit that a careful reading and examination of the evidence of the appellee William H. Albright leads to very serious doubts of his credibility.

The appellee Villa C. Albright also testified for the appellees (Tr. pp. 113-116), but her evidence is practically all negative in character. She denies that she ever had any conversation with either the defendant Jennie Peterson or the witness Whittaker or in the presence of either of them, in regard to Jennie Peterson holding down a homestead for either of the appellees (Tr. pp. 113-114), and never even talked to Jennie Peterson about her homestead (Tr. p. 114). She testified that she was never very friendly with the defendant Jennie Peterson, that they were not on very good terms (Tr. pp. 113-114), yet the evidence is undisputed that the defendant Jennie Peterson worked for the appellees at various times covering a period of eight or nine years beginning with the year 1895 (Tr. p. 100), and up to as late as July, 1904 (Tr. p. 103). If the appellee Villa C. Albright and Jennie Peterson were not friendly, were not on good terms, is it reasonable to believe that the appellees would have employed her to work for them during all those years, and that the appellee Villa C. Albright, knowing that the defendant Jennie Peterson was holding down a home-

stead, would have not at least, casually talked with her in regard to it at some time? The evidence of the appellee Villa C. Albright is not consistent, is not reasonable and leaves the impression that it was given for the sole purpose of corroborating and bolstering up the evidence of the appellee William H. Albright.

Taking the evidence of all of the witnesses for both the appellant and appellees and considering it as a whole, in connection with the admitted facts and circumstances, the only reasonable conclusion that can be arrived at is that an unlawful contract or agreement was entered into between the defendant Jennie Peterson and the appellee William H. Albright, and that the terms of such unlawful contract or agreement were fully carried out and performed when the defendant Jennie Peterson, after entering and acquiring title to said lands, conveyed said lands to the appellee Villa C. Albright, and the court therefore erred in holding that the proof failed.

PURCHASE BY VILLA C. ALBRIGHT.

If there was no unlawful contract or agreement between the defendant Jennie Peterson and the appellee William H. Albright in regard to the entering and acquiring title to said lands then the appellee Villa C. Albright was an innocent purchaser for a valuable consideration for it would make no difference to the appellant whether the purchase price paid to the defendant Peterson was paid out

of the moneys belonging to the appellee Villa C. Albright or whether it was paid out of the moneys belonging to the appellee William H. Albright, but if such an unlawful contract or agreement was entered into between the defendant Peterson and the appellee William H. Albright and the terms thereof were fully carried out and performed the appellee Villa C. Albright was not an innocent purchaser for a valuable consideration if she knew of the existence of such unlawful contract or agreement, or if she did not know of its existence but the purchase price paid to the defendant Peterson was paid out of the moneys of the appellee William H. Albright and the title thereto was taken in the name of appellee Villa C. Albright in which event she would hold the title to said lands as trustee for the appellee William H. Albright.

That the appellee Villa C. Albright did know of the existence of an unlawful agreement or contract, with reference to said lands, between the defendant Peterson and the appellee William H. Albright, we have the evidence of the witnesses who testified on the part of the appellant.

Jennie Peterson testified (Tr. pp. 53-75), in substance, that she knew Mrs. Albright; that Mrs. Albright knew where the witness was working at the time she was holding down her homestead; and that she often spoke to the witness about the land and said that they would have lots of land for the boys (Tr. pp. 58-59); that Mrs. Albright made other statements about the homestead entry of the wit-

ness, sometimes speaking favorably of it and at other times calling it a lot of worthless land (Tr. p. 59); that Mrs. Albright did not hear the agreement made between the witness and the appellee William H. Albright but it was understood that he was to buy the land and Mrs. Albright knew that (Tr. p. 59); that Mrs. Albright made statements to the witness to the effect that the boys would own the land upon that hill or on the bench, that they would have a nice ranch for the boys (Tr. p. 59); that land embraced the homestead of the witness (Tr. p. 59); that Mrs. Albright spoke about the land the witness was holding in general with the other as a lot of worthless land and other times she would say that she was glad they were getting so much land for the boys (Tr. p. 67); that there was no discussion other than in a general way that my land belonged to them, but it was an understanding, she knew as well as all of them knew (Tr. p. 67); that the bargain was not made with Mrs. Albright it was made with Mr. Albright; she didn't do any business, he did (Tr. p. 67); that the witness and Mrs. Albright never had any discussion as to the price or the obligations of the witness to turn over the land, but Mrs. Albright knew it all right because it was common conversation down there (Tr. p. 67); that between the witness and Mrs. Albright it was understood perhaps about the witness not being a rancher for long, that Mr. Albright or the boys would own the land pretty soon, they would own the whole country up there pretty soon (Tr. p. 67).

The witness Frank C. Whittaker testified (Tr. pp. 75-93), in substance, that he had his first conversation with the Albrights in regard to Jennie Peterson in April, 1901; the three of them talked it over and thought it would be a good thing to get her to come out and take up land for Mrs. Albright; she thought it would be a good thing and had no objections and they could send for her (Tr. p. 75); Jennie Peterson said she would come and Mr. Albright wanted to know if it was all right with the witness and the witness said yes and talked with Mrs. Albright and she thought it would be all right to have her come out and keep books and take up some land (Tr. p. 76); the witness knows that Jennie Peterson, then Jennie Benedict, took up the homestead for Mrs. Albright because Mr. and Mrs. Albright and the witness talked about it (Tr. p. 76); Mr. and Mrs. Albright said that Jennie Peterson was to receive \$750. when she got her patent (Tr. p. 76); Mr. and Mrs. Albright told the witness that they were paying for the improvements the same as for the rest of them (Tr. p. 76); that when Jennie Peterson went up to her homestead a few weeks before she was to make final proof Mrs. Albright told her to take some provisions out of the kitchen (Tr. p. 77-78); Mr. and Mrs. Albright sent the witness up one time so that in case there was any trouble he could be a witness that he saw her living on the land and he took up some provisions which he got out of the Albright's kitchen (Tr. p. 78); the witness never heard any conversation between Mrs.

Peterson and Mrs. Albright as to the bargain, but he did hear them talking about Jennie Peterson going up and staying on the land (Tr. p. 90); that is was the understanding that she was to hold down a homestead for Mrs. Albright (Tr. p. 90).

Taking up this evidence in its logical order we have the evidence of the witness Whittaker that Jennie Peterson being in Michigan the witness and the appellees discussed the matter of having Jennie Peterson, then Jennie Benedict, come out and take up a homestead for Mrs. Albright and finally agreed that they would do so. Then the evidence of the defendant Jennie Peterson that after making her homestead filing she frequently talked with Mrs. Albright about it and that Mrs. Albright knew that it was taken up for Mr. Albright and that when Jennie Peterson acquired title to the lands it was to be conveyed to Mr. Albright; that after the filing was made Jennie Peterson when going up to her homestead to stay for a few weeks before making her final proof she took provisions out of the Albright's kitchen. The evidence of the witness Whittaker that after Jennie Peterson had made her filing Mrs. Albright told the witness that they were paying for the improvements on the Jennie Peterson homestead the same as the rest of them; that when Jennie Peterson went up to her homestead the last time, a few weeks before she made final proof, Mrs. Albright told her to take some provisions out of the kitchen, and that Mr. and Mrs. Albright sent the witness Whittaker up one time so that he

could be a witness that he had seen Jennie Peterson living on her homestead and that at that time he took some provisions out of the Albright's kitchen.

To meet this evidence on the part of the appellant we have the evidence of the two appellees. The appellee William H. Albright testified (Tr. pp. 96-113), that he never entered into any contract or agreement of any kind with the defendant Jennie Peterson in regard to the land; that he did not pay the filing fee or purchase price paid to the land office; that he did not pay for making the improvements and did not pay the expenses of Jennie Peterson and her final proof witnesses in connection with the entry and final proof, which evidence we have already reviewed at some length. The appellee Villa C. Albright testified (Tr. pp. 113-116), that she never had any conversation with the defendant Jennie Peterson about her holding down a homestead for either Mr. or Mrs. Albright; that she did not think there was any agreement between Jennie Peterson and her husband that she was holding the homestead for Mr. Albright; that the appellee never had any conversation with Jennie Peterson or any one else in which they spoke of her holding the homestead for either herself or her husband William H. Albright (Tr. p. 113); that she never had any conversation in the presence of the witness Whittaker in which she admitted that people were holding down homesteads for them (Tr. p. 114); that Jennie Peterson, then Jennie Benedict was working for them, the Albrights and that she made their place

her headquarters living in their house (Tr. p. 114); that she was not very friendly with Jennie Peterson and never talked with her about her homestead or what she was going to do with it (Tr. p. 114).

The evidence of the appellee William H. Albright was in line with all of his other evidence, merely negative in character, without attempting to give any reasonable explanation of matters which might have been explained. The evidence of the appellee Villa C. Albright is not only negative in character but much of it wholly unreasonable. She testified that she knew Jennie Peterson was holding down a homestead, and that during a portion of the time she was working for the appellees and going up occasionally to stay over night on her homestead. Now it would have been the most natural thing in the world for them to have talked about Jennie Peterson's homestead and discuss what she was going to do with it after she got her title, yet, according to Mrs. Albright's evidence, the matter was never even casually mentioned between them, never even mentioned at all. With two women living under the same roof, associated together in their work more or less, as the evidence shows Mrs. Peterson and Mrs. Albright were, it is utterly impossible to believe the evidence of Mrs. Albright to be true that the matter of the homestead was never even mentioned between them, and to our minds this evidence of Mrs. Albright tends to discredit her entire evidence to such an extent that none of it should be given any weight.

We therefore submit that the evidence discloses clearly and plainly that the appellee, Villa C. Albright, not only knew at the time the deed was executed by Jennie Peterson and the title to the property was placed in her name, that it was in pursuance of an unlawful contract or agreement between the defendant Jennie Peterson and the appellee William H. Albright, but that she also knew at the time Jennie Peterson made her homestead filing that it was made in pursuance of such contract or agreement.

That the property was purchased from the defendant Jennie Peterson with moneys belonging to the appellee William H. Albright there can be no doubt whatever. The defendant Jennie Peterson testified that when she transferred the land to Villa C. Albright the appellee William H. Albright told her to have the papers made out to Villa C. Albright as he desired the property in her name for a while yet, all his property in her name (Tr. p. 60); that she got \$600 for the land, \$500 in a note signed by W. H. Albright and \$100. either in cash or in a check; the note was signed by W. H. Albright and he did not sign as agent for Villa C. Albright; that she never had any dealings with Mrs. Albright and that none of the business was in Mrs. Albright's name except the taking of the deed; the note was paid the next May by Mr. Albright (Tr. p. 60); that at the time the purchase was made by Mr. Albright she was paid with a note for \$500. and the balance in cash or checks; that the witness could

not recall the details but remembers distinctly the note; it was in September or the last of August, 1905 (Tr. p. 67); Mr. Albright did not give her the explanation that Mrs. Albright was away and for this reason asked her if she was willing to take a note; Mr. Albright never considered Mrs. Albright when he wanted to do business and Mr. Albright was the only one that did business (Tr. p. 69).

The appellee William H. Albright testified that he signed the note to Mrs. Peterson for her homestead because Mrs. Albright did not like Mrs. Peterson and would not sign the note (Tr. p. 102); that he paid Mrs. Peterson \$800. for the land, \$150. in cash, \$150. by check, and \$500. in a note signed by him, and that Mrs. Albright reimbursed and repaid him this money (Tr. p. 102); that they kept their money separate but that he managed all of the business (Tr. p. 102); that Mrs. Albright was in town but that he signed the check and the note because Mrs. Albright was not on very good terms with Mrs. Peterson and would not sign them (Tr. p. 108); that he told Mrs. Albright that he was going to buy the land in her name (Tr. p. 108); that when he married Mrs. Albright she had no property except \$50; that the property was bought in her name for protection; that she leased the property to the B. and M. Smelter and that he closed the transaction without consulting her; that some times he asks her advice but not very often (Tr. p. 117).

The appellee Villa C. Albright testified that she did not remember giving Mr. Albright a check to

pay the Peterson note with; that she allowed Mr. Albright to handle her money as he saw fit (Tr. p. 114); that she did not sign the Peterson check or note; that the first check to Jennie Peterson was not signed by her and she knew nothing of the transaction until he asked her to sign the note and she would not because she did not like Mrs. Peterson (Tr. p. 115).

This evidence shows that at the time the deed was executed and the purchase price paid over to Jennie Peterson the entire transaction was between Jennie Peterson and the appellee William H. Albright and that his wife Villa C. Albright took no part in it, Villa C. Albright testifying positively that she knew nothing whatever about it until her husband asked her to sign the note. It further shows that a portion of the purchase price was represented by a note and a portion by a check and that both were signed by the appellee William H. Albright.

The appellees attempt to explain the signing of the note by William H. Albright by saying that Mrs. Albright did not like Jennie Peterson was not on good terms with her. This explanation is decidedly flimsy. If the purchase was being made for Villa C. Albright and eventually the money was to come out of her pocket what difference could it make to her whether or not she was friendly or unfriendly with Jennie Peterson or whether she was or was not on good terms with her, so far as signing the note was concerned? Her feeling towards

the defendant Jennie Peterson had nothing whatever to do with her signing the note. If she signed it she expected to have to pay it when it became due and if she did not sign it but her husband signed it for her she expected to pay it just the same. The truth of the matter is that some reason had to be assigned or explanation given for the signing of the note by William H. Albright if the purchase was made by Villa C. Albright, or for her, hence the reason given, that Mrs. Albright did not like Mrs. Peterson and was not on friendly terms with her. But the check which the appellee William H. Albright testifies he gave Mrs. Peterson as part of the purchase price was signed by him and not by Mrs. Albright and no reason or explanation whatever is given by either Mr. or Mrs. Albright for the signing of the check by Mr. Albright instead of Mrs. Albright. Even if Mrs. Albright was not friendly with Mrs. Peterson and was not on good terms with her that could be no excuse for her not signing the check. The check could have been drawn in favor of her husband and he could have endorsed it and handed it to Mrs. Peterson, or he could have cashed it and paid the money over to Mrs. Peterson, but apparently nothing of this kind was done. Mr. Albright did not ask his wife to sign the check or to give him the money to pay the amount of the purchase price in excess of the \$500. represented by the note, he simply drew his own check against his own account and gave it to Mrs. Peterson.

Examining the evidence of Mr. and Mrs. Al-

bright further, we find that it shows that when they were married all the property owned by Mrs. Albright was \$50. (Tr. p. 117), and that the appellee William H. Albright had conveyed all of his property to his wife in order to protect himself against any judgments which might be obtained against him on account of injuries received by his employes while he was operating the quarry (Tr. p. 117). In effect this evidence says that all of the property belonged to William H. Albright, but in order to protect himself he carried the title in the name of his wife Villa C. Albright.

We submit that all of this evidence shows conclusively that while this property was conveyed to the appellee Villa C. Albright it was purchased with money of the appellee William H. Albright, and that the title to this particular land is held by the appellee Villa C. Albright as a trustee for the appellee William H. Albright.

We wholly agree with the general doctrine as laid down in *United States vs. Maxwell Land Grant Company*, 121 U. S. 328, *Colorado Coal and Iron Co. vs. United States*, 123 U. S. 307; *United States vs. Budd*, 144 U. S. 154, and many other decisions; that in cases of this character the testimony must be clear, unequivocal and convincing and requires more than a mere preponderance of the evidence, and we most earnestly submit that the evidence in this case, when closely examined and analyzed, not only preponderates in favor of the appellant, but it is so clear and convincing that it must lead to the

conclusion that an unlawful agreement or contract was entered into between the defendant Jennie Peterson and the appellee William H. Albright, and that the terms of such contract or agreement were fully performed and carried out, and that the appellee Villa C. Albright acquired title to said lands not only with notice of the fraud perpetrated upon the appellant but as a trustee for the appellee William H. Albright, and that, therefore, the lower court was in error in holding that the allegations contained in the bill complaint were not sustained by the proof and in dismissing the bill of complaint and entering judgment against the appellant and in favor of the appellees.

Respectfully submitted,

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Assistant U. S. Attorney.

